

1 HONORABLE JOHN H. CHUN
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 FEDERAL TRADE COMMISSION,

Civil Action No. 2:23-cv-0932-JHC

10 Plaintiff,

**MOTION OF THE CHAMBER OF
COMMERCE OF THE UNITED
STATES OF AMERICA FOR
LEAVE TO FILE A BRIEF AS AMI-
CUS CURIAE**

11 v.

12 AMAZON.COM, INC., *et al.*,

13 Defendants.

NOTE ON MOTION CALENDAR:
November 10, 2023

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1 Pursuant to Local Rule 7 and Rule 7 of the Federal Rules of Civil Procedure, the
 2 Chamber of Commerce of the United States of America respectfully moves for leave
 3 to file a brief as *amicus curiae* in the above-captioned case in support of Defendants'
 4 Motion to Dismiss the Amended Complaint. The proposed *amicus* brief is attached as
 5 Exhibit A. In support of this motion, the Chamber states as follows:

6 1. The Chamber of Commerce of the United States of America ("Chamber") is the
 7 world's largest business federation. It represents approximately 300,000 direct mem-
 8 bers and indirectly represents the interests of more than three million businesses and
 9 professional organizations of every size, in every industry sector, and from every re-
 10 gion of the country. An important function of the Chamber is to represent the inter-
 11 ests of its members in matters before Congress, the Executive Branch, and the courts.
 12 To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one,
 13 that raise issues of concern to the business community.

14 2. The Federal Trade Commission ("FTC") alleges in this case that Defendants
 15 violated the Restore Online Shoppers' Confidence Act ("ROSCA") through their use
 16 of unlawful negative option features. *See* Amended Compl. ¶¶ 267–80. The Chamber
 17 proposes the attached brief because it has a strong interest in ensuring that busi-
 18 nesses can continue lawfully using widespread marketing practices to fairly compete
 19 in the marketplace, as is consistent with ROSCA policy. *See* 15 U.S.C. §§ 8401(1)–(2).

20 3. "District courts may consider *amicus* briefs from non-parties concerning legal
 21 issues that have potential ramifications beyond the parties directly involved or if the
 22 *amicus* has unique information or perspective that can help the court beyond the help
 23 that the lawyers for the parties are able to provide." *Macareno v. Thomas*,
 24 378 F. Supp. 3d 933, 940 (W.D. Wash. 2019) (quotation marks and citation omitted).
 25 "The 'classic role' of *amicus curiae* is to assist a court in a case of public interest by
 26 'supplementing the efforts of counsel.'" *California v. U.S. Dep't of Interior*,

1 381 F. Supp. 3d 1153, 1163–64 (N.D. Cal. 2019) (citing *Miller-Wohl Co. v. Comm'r of*
 2 *Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982)). “There are no strict prerequisites
 3 that must be established prior to qualifying for amicus status; an individual seeking
 4 to appear as amicus must merely make a showing that his participation is useful or
 5 otherwise desirable to the court.” *Id.* at 1164. “[G]enerally, courts have ‘exercised
 6 great liberality’ in permitting amicus briefs.” *Id.* (citing *Woodfin Suite Hotels, LLC v.*
 7 *City of Emeryville*, No. C 06-1254 SBA, 2007 WL 81911, at *3 (N.D. Cal. Jan. 9, 2007)).

8 4. In this case, the legal issues surrounding dark patterns have tremendous
 9 “ramifications beyond the parties directly involved.” *Macareno*, 378 F. Supp. 3d at
 10 940. In fact, the FTC estimates that “106,000 entities currently offer[] negative option
 11 features,” 88 Fed. Reg. 24716, 24733 (Apr. 24, 2023), all of which would be subjected
 12 to potential liability based on the same theories of unlawful conduct alleged here.

13 5. Moreover, and as explained more fully in the proposed brief, the FTC com-
 14 menced rulemaking on negative option features four years ago. *See* 84 Fed. Reg. at
 15 52393. Since the FTC initiated rulemaking, it has received more than 1,000 com-
 16 ments from the regulated community, including from entities collectively supporting
 17 hundreds of thousands of businesses. *See, e.g.*, International Franchise Association,
 18 Comment ID FTC-2023-0033-0856, at 1 (2023) (submitting comments in support of
 19 “approximately 790,492” franchised businesses), *available at* <https://www.regula->
 20 [tions.gov/comment/FTC-2023-0033-0856](https://www.regulations.gov/comment/FTC-2023-0033-0856). There is thus no question that the ramifi-
 21 cations of this case extend well beyond the parties directly named in this lawsuit.

22 6. As the world’s largest business federation, the Chamber has “unique infor-
 23 mation and perspective” about negative option features that will assist this Court in
 24 resolving Defendants’ Motion to Dismiss. *Macareno*, 378 F. Supp. 3d at 940. The
 25 Chamber provides this information mindful about the proper function of an *amicus*
 26 brief, “presenting ideas, arguments, theories, insights, facts, or data that are not

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1 found in the briefs of the parties.” *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020) (granting the Chamber’s motion to file
 2 *amicus* brief because it had “provide[d] insight”). In its attached brief, the Chamber
 3 “provide[s] practical perspectives” and “empirical data” to this Court on the “conse-
 4 quences of potential outcomes” here. *Id.*

5 7. In particular, if this Court accepts the FTC’s novel theories of prohibited
 6 “dark pattern” practices, then hundreds of thousands of businesses would have no
 7 means to conform their conduct to the law. As a result of this tremendous uncertainty,
 8 and as explained more fully in the brief, a ruling in favor of the FTC would (1) inhibit
 9 investments and jobs, (2) discourage innovation, and (3) upend numerous business
 10 models. The Chamber provides this Court with academic analysis and practical per-
 11 spectives from the business community to show why these outcomes would occur if
 12 the FTC’s theories of prohibited conduct are accepted.

13 8. In addition, and although these adverse effects would plague businesses of
 14 all sizes, small businesses would bear the brunt of these costs because they have
 15 fewer resources to devote to ensuring that they could comply with the vague stand-
 16 ards of prohibited “dark patterns” proposed by the FTC. The Chamber provides this
 17 Court with information from the U.S. Small Business Administration and practical
 18 perspectives from the business community to show why this outcome would occur if
 19 the FTC’s theories of prohibited conduct are accepted.

20 9. Another consequence would be increased consumer costs and decreased con-
 21 sumer choices. The Chamber explains why in its brief by analyzing comments sub-
 22 mitted to the FTC during its relevant rulemaking alongside an important analysis
 23 from the consulting firm McKinsey & Company.

24 10. Finally, the Chamber seeks to assist this Court by explaining the fair-notice
 25 concerns to the entire regulated community if this Court allows the FTC to sidestep

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1 ongoing notice-and-comment processes. More specifically, numerous businesses have
 2 followed, studied, and submitted comments on the FTC's four-year-old rulemaking to
 3 amend its Negative Option Rule. *See* 88 Fed. Reg. at 24717 (amending 16 C.F.R.
 4 § 425.1). But rather than follow this mandatory process to give the regulated commu-
 5 nity fair notice of prohibited conduct, the FTC purports to ban so-called "dark pat-
 6 terns" with its vague definitions alleged in this lawsuit. The Chamber explains in its
 7 brief why this Court should not adopt an interpretation of ROSCA through the FTC's
 8 enforcement-by-litigation strategy here that effectively seeks a nationwide ban over
 9 indeterminate "dark patterns" or "manipulative design elements."

10 11. Given its perspective and deep understanding of the issues involved in this
 case, the Chamber regularly files briefs as *amicus curiae* in cases involving the FTC.
 12 *See, e.g., Axon Enterprise, Inc. v. Fed. Trade Comm'n*, 598 U.S. 175 (2023); *Fed. Trade*
 13 *Comm'n v. Microsoft Corp., et al.*, No. 23-15992, Dkt. 63 (9th Cir. 2023); *Illumina, Inc.*
 14 *et al. v. Fed. Trade Comm'*, No. 23-60167, Dkt. 118 (5th Cir. 2023); *Fed. Trade*
 15 *Comm'n v. Walmart, Inc.*, No. 1:22-cv-03372, Dkt. 32-1 (N.D. Ill. Sept. 6, 2022); *Fed.*
 16 *Trade Comm'n et al., v. Amgen Inc., et al.*, No. 1:23-cv-03053, Dkt. 148-1 (N.D. Ill.
 17 Aug. 28, 2023).

18 12. The Chamber requested consent from the parties to filing a brief as *amicus*
 19 *curiae* in this case. Defendants consent. The FTC does not consent at this time.

20 13. The Chamber thus respectfully requests that this Court grant it leave to file
 21 the proposed *amicus* brief submitted with this motion.

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2 Dated: October 25, 2023
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Respectfully submitted,

s/ Daniel D. Birk

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